

In the Matter of Harry Lucas

DOP Docket No. 2003-850

(Merit System Board, decided May 10, 2006)

The appeal of Harry Lucas, a Budget Officer with Gloucester County, of his removal effective July 31, 2002, on charges, was heard by Administrative Law Judge Stephanie M. Wauters (ALJ), who rendered her initial decision on December 20, 2005. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on May 10, 2006, accepted and adopted the Findings of Fact as contained in the initial decision with the exception of Findings of Fact 14, 15 and 16. However, the Board did not adopt the ALJ's recommendation to reverse the removal. Rather, the Board upheld the removal.

DISCUSSION

The appellant was removed on charges of incompetency, inefficiency or failure to perform duties, insubordination, and conduct unbecoming a public employee. Specifically, the appointing authority asserted that the appellant failed to complete work in a timely and efficient manner, failed to perform the work assigned by his supervisor and placed an inappropriate document on his department head's desk. Upon the appellant's timely appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ dismissed the charge of conduct unbecoming a public employee, which related to the allegation that the appellant placed an inappropriate document on his department head's desk, as she determined that insufficient evidence was presented regarding this charge. She indicated that the appellant testified that he and Margaret Smith, the Director of Economic Development, regularly gave articles to each other and noted that Ms. Smith did not testify at the hearing. The ALJ also found that during the six-month period from the appellant's return from a ten-day suspension on October 2, 2001, until the Preliminary Notice of Disciplinary Action (PNDA) issued on March 28, 2002, the appellant substantially improved his job performance and substantially complied with the directives of his supervisors. She determined that the appellant's job performance during this period was neither inefficient nor insubordinate. Specifically, the ALJ noted that from October 2001 forward, the appellant provided the grant reconciliation reports in the required manual report format; by December 4, 2001, the appellant submitted the monthly reconciliation reports from November 2000 to October 2001 in proper manual format, and subsequently revised them and

resubmitted the reports on January 8, 2002; timely submitted the January 2002 reconciliation report with no errors; submitted the November 2001, December 2001 and February 2002 reconciliation reports two to three days late; from January 1, 2002 forward did manual pre-encumbrances and signed manual timesheets; and straightened out any voucher problems with the Courier Post. She noted that the appellant did these assignments notwithstanding his use of vacation days, performing his normal duties, and attempting to complete make-up work simultaneously assigned around the September 2001 ten-day suspension by three supervisors. She concluded that the appellant finally did change his work habits and attitude, got the message and substantially improved his job performance. Thus, the ALJ recommended that the removal be reversed.

In its exceptions, the appointing authority argues that the evidence unequivocally demonstrated that the appellant's performance and work product did not improve during the relevant time period but rather, the appellant remained insubordinate, incompetent and inefficient and continued to fail to perform his duties. The appointing authority maintains that the appellant's removal was appropriate given the charges, the appellant's past disciplinary record and his failure to improve or respond to prior discipline, and there is nothing to suggest that the imposition of another major disciplinary action would have made any difference in the appellant's conduct.

In his cross exceptions, the appellant argues that the evidence demonstrates that he substantially complied with his supervisor's directives and did not engage in conduct unbecoming a public employee during the relevant period. The appellant contends that removal is unduly harsh, violates the concept of progressive discipline and is inconsistent with *N.J.S.A. 38:16-1* (Removal of veterans from office or position).

In the instant matter, with respect to the charge of conduct unbecoming a public employee, the Board agrees with the ALJ's assessment of the charge. However, the Board does not agree with the ALJ's assessment of the other charges and her recommendation that the removal should be reversed. Rather, the Board finds that the removal should be upheld. While the ALJ provided an accurate summary of the testimony presented, it is unclear how she arrived at her conclusion given the voluminous testimony and documentation presented to the contrary. A review of the testimony finds that even after the imposition of the ten-day suspension, the appellant continued to submit untimely and inaccurate work and continued to refuse to complete assigned tasks and sign required time sheets for a significant period after his suspension. In this regard, the Board notes that the appellant, in his own testimony, essentially admits that he did not comply with the directives of his superiors or complete his assigned work in a timely manner. The Board's review of the testimony indicates numerous examples where the appellant simply and directly refused to complete the assignments that were his responsibility

as directed by his superiors. Such non-compliance clearly constitutes insubordination. Moreover, the testimony of all the witnesses, including the appellant's, is replete with examples of instances where the appellant failed to timely and accurately complete his duties after his return from his ten-day suspension, which supports the charge of incompetency, inefficiency or failure to perform duties.

In regard to the Findings of Fact, the Board does not affirm Findings of Fact 14 and 15, which refer to the receipt of monthly reconciliation reports in the required manual format, as William Gerson's¹ memorandum dated December 4, 2001 (Exhibit J-16) indicated that while the manual reports for November 2000 through September 2001 were received, the October 2001 report, which was due November 8, 2001, had not been received. In addition, the memorandum indicated that there were errors in all of the reports except for the July 2001 report. Regarding Finding of Fact 16, which indicates that the appellant provided pre-encumbrances and signed time sheets after January 1, 2002, in a memorandum dated February 22, 2002 (Exhibit J-24), issued approximately a month before the PNDA, the appellant's supervisor, Tamara Primas-Thomas, indicated that she received the pre-encumbrances for March 2002 but had not received any other pre-encumbrances since July 1, 2000. With respect to the time sheets, the appellant testified that he had not been filling out the time sheets although Primas-Thomas directed him to do so and had not signed any of the time sheets from October 8 through November 30, 2001. However, he testified that he eventually started signing the time sheets in December 2001 for January 2002, but not on a consistent basis. He considered the time sheets Primas-Thomas requested as redundant. However, the testimony indicates that the purpose of the time sheets was to allocate costs to the appropriate grant.

With respect to Finding of Fact 17, in which the ALJ notes that the appointing authority did not provide an analysis to demonstrate whether the appellant or the County's records were the source for the errors in the monthly reconciliation reports prepared by the appellant, the Board notes that there was testimony that the County received recommendations from its auditors for fiscal years 2000 and 2001 due to the grant reports prepared by the appellant not reconciling to the County records. With respect to Finding of Fact 20, which indicates that the appellant was assigned make-up work and was absent a significant amount of time, the Board emphasizes that the "make-up work" consisted of assignments that the appellant had been previously directed by his

¹ William Gerson was a Fiscal Officer responsible for reviewing the appellant's reports. It is noted that while Gerson is referred to as a Budget Officer in the ALJ's decision and throughout the parties' submissions, Department of Personnel records do not indicate that Gerson held the title of Budget Officer. Gerson was permanently appointed to the Fiscal Officer title in September 1990 and held that title until his separation in February 2003.

superiors to complete but had disregarded.² In addition, although the appellant testified that he did not have enough time to complete his assigned tasks after he returned from his ten-day suspension due to leave time he had to use or else forfeit, the Board notes that the use of vacation leave time does not provide a valid basis for the appellant's failure to complete his assigned duties in a timely and accurate manner. With respect to Finding of Fact 21, which indicates that from September 2001 until March 28, 2002, the County did not lose any Workforce Development grant monies and no Workforce Development grant student was deprived of the opportunity to complete a course, this finding should be read in conjunction with Finding of Fact 18, which states that Primas-Thomas and Gerson devoted several hours of their time to revising or correcting the appellant's work. In this regard, the Board stresses that there was testimony that either the appellant's superiors or other County employees had to take time out from their schedules to correct the appellant's mistakes.³

In addition, it is not clear how the ALJ concluded that the Courier Post issue had been "straightened out." In this regard, the appellant testified that when Primas-Thomas asked him to resolve this issue, he called the Courier Post and assumed that since the Courier Post did not shut the County off, the issue was obviously resolved. However, it is noted that as late as February 22, 2002, Primas-Thomas indicated in her memorandum to the appellant that "another late notice from the Courier Post [was] sent to this office without resolution." Primas-Thomas testified that this was the same issue that was addressed in her July, September and December 2001 memoranda to the appellant. As far as she was aware, the Courier Post issue had never been resolved and the appellant did not provide her with the letter she requested he prepare with regard to this issue. Accordingly, based on its review of the entire record, including the testimony presented at the hearing, the Board finds that the appointing authority sustained its burden of proof regarding the charges of insubordination and incompetency, inefficiency or failure to perform duties.

In determining the proper penalty, the Board's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident, the Board also utilizes, when appropriate, the concept of progressive discipline. *See West New York v. Bock*, 38 N.J. 500 (1962). However, it is well established that when the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history.

² It is noted that the memorandum dated October 29, 2001 (Exhibit J-15) from Primas-Thomas to the appellant outlines new duties. However, Primas-Thomas testified that she previously discussed these tasks with the appellant.

³ In her memorandum to Margaret Smith, dated October 24, 2001 (Exhibit J-11), Primas-Thomas stated that the County was in danger of losing a portion of the Workfirst New Jersey grant due to the appellant's actions and had it not been for the involvement of two County employees, it would have been lost.

See Henry v. Rahway State Prison, 81 N.J. 571 (1980). The appellant's prior disciplinary history since his employment in 1987 includes three disciplinary actions which all involve performance issues: a three-day suspension in 1997 for chronic inefficiency, a two-day suspension in 1999 for inefficiency and a 10-day suspension in 2001 for inefficiency, failure to perform duties and insubordination. The record clearly shows that when the appellant was informed of his poor job performance, his performance continued to be unsatisfactory and substandard in that he did not complete assigned duties even though he was given numerous memoranda, had meetings and verbal communications with his superiors and had been subjected to three suspensions. Through his actions, appellant failed to perform his assigned tasks, and thereby neglected his duties. The appellant was clearly on notice of the deficiencies in his work performance. The Board notes that the appellant did not testify that he was unaware of his assigned duties or was unable to perform these tasks, but rather he testified that he did not perform the assigned tasks and duties as directed by his superiors because he believed he had a better way of doing things and he felt that some of the tasks were not necessary. Finally, the Board notes that appellant had ample notice of and opportunity to improve his unsatisfactory job performance. Accordingly, given the pattern and egregious nature of appellant's conduct and his disregard of the directives of his superiors, and the fact that the appellant has been disciplined for his performance deficiencies on several previous occasions, the appropriate penalty in this case is removal. In this regard, the Board notes that removal, even without regard to prior disciplinary history, may be imposed on an employee who fails to perform his or her duties in a satisfactory manner over a long period of time. *See, e.g., In the Matter of Sheila Hughes* (MSB, decided December 17, 2003); *In the Matter of Angel M. Peralta* (MSB, decided November 19, 2003); *In the Matter of Andrew Thomas* (MSB, decided September 26, 2000); *In the Matter of David Long* (MSB, decided August 8, 2000).

ORDER

The Merit System Board finds that the appointing authority's action in removing the appellant was justified. The Board, therefore, affirms that action and dismisses the appeal of Harry Lucas.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum